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DISPOSAL OF ENEMY PROPERTY

BY JOSEPH CONRAD FEHR

NEARLY two years have passed since America's Treaty of Peace with Germany was signed pursuant to the Porter-Knox Peace Resolution, and still the Alien Property Custodian has in his possession approximately \$350,000,000 worth of real and personal property, stocks and bonds, cash, etc., which formerly belonged to German and Austrian nationals. Most of this property was seized during the war, although some of it was taken over subsequent to the signing of the Armistice. And the question uppermost in the minds of statesmen and business men who are trying to remedy the economic ills of America, as well as of the former enemy nations, is predicated upon the many proposals that are offered for the disposition of this vast amount of private property.

The practice of confiscation of private enemy property, although sanctioned by the law of nations as it obtained for centuries, and in English and American jurisprudence up to the time of the War of 1812, is no longer tolerated by the enlightened thought of the world. Confiscation has long been repugnant to the theory of fair dealing and the development of international enterprise. Accordingly economists in and out of Congress are to-day trying to devise ways and means of disposing of the property in the hands of the Alien Property Custodian in a manner that will be fair and equitable to its real owners and at the same time will safeguard the interests of American nationals who have claims against Germany and German nationals in an amount that extends into hundreds of millions of dollars.

It is urged by some that America should make an unconditional return of all enemy owned property. Others insist that the United States should hold this property as a set-off against American claims, thus forcing the enemy Government to reimburse the American nationals. The most radical American claimants are

asking for an outright confiscation of this property by the American Government. And still another view is that the United States should hold this property as collateral security in the nature of a pledge, in behalf of American claims against these former enemies.

In defining the present policy of the United States Government concerning the disposition of all former enemy property, Congress will have to govern itself to a large extent by the policy adhered to by the Government in the past. Never was a nation more generous to its enemies than the United States has been upon the termination of its various wars. Those who now insist upon an unconditional surrender to former owners of all enemy property, point with considerable effect to the fact that Alexander Hamilton, first Secretary of the Treasury in Washington's Cabinet, assumed in behalf of the newly formed Federal Government the payment of every cent of the property, both real and personal, which had been taken from British nationals, non-resident as well as resident, by orders of confiscation of the thirteen original Colonies during the Revolutionary War.

The early treaties entered into by the United States with Great Britain, Germany and other European nations, recognized the principle that privately-owned property ought never to be confiscated in time of war. Chief Justice Marshall, as early as 1814, in laying down his famous decision in the case of *Brown v. the United States* (8 Cranch, 110, 128), recognizing the physical power and the practice of confiscation in the past, stated in unequivocal terms that "according to the modern usage" private property of the enemy found in national territory "ought not to be confiscated". He added further that "this usage . . . can not be disregarded by (the sovereign) without obloquy". This dictum was reiterated by Mr. Justice Wilson in *Ware v. Hylton* (3 Dallas [U. S. 1796] 198), who stated in his opinion that "by every nation, whatever its form of government, confiscation of debts has long been considered disreputable". And debts, of course, are merely one form of property. Mr. Justice Clifford, in *Hanger v. Abbott* (6 Wall. [U. S. 1867] 532), designated confiscation "a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times". Dicta to the same

effect can be found in other cases which have since been decided by the Supreme Court of the United States.

Shall the United States, in view of this unimpeachable line of authorities, both upon law and upon national policy, retain the property held in trust by the Alien Property Custodian, even as a pledge to secure the payment by former enemies and enemy nationals of the many millions of dollars' worth of claims held by Americans, or is this Government under duty to return unconditionally this property to its former enemy owners?

Many Senators and Representatives would have Congress make provision to return at once all the property taken over by the Alien Property Custodian, without regard to the claims of Americans against former enemy countries and enemy nationals. However, these American claimants have now been waiting several years for the German Government to pay them approximately \$300,000,000 on account of lives of relatives lost on the Lusitania as well as property seized or destroyed during the war.

It is becoming more and more evident that the United States will be denied priority on money spent since the signing of the Armistice in maintaining its army along the Rhine. German assets are under mortgage to the Allies. In view of this depressing condition in Germany, American claimants are clamoring for government protection of their rights and ask that the property controlled by the Alien Property Custodian, approximating \$350,000,000, be held as collateral security, or as a pledge, to enforce the payment of these American claims by Germany and Austria, or their nationals.

Most of the American claims are for marks. The former value (March, 1917) of marks was seventeen and three-sixteenths cents a mark. The present value is half a cent a mark. Under the Treaty of Versailles, the claims of British, French and other Allied nationals have already been paid in full at former rates of exchange (August, 1914) out of seized property under the Clearing House provisions of the Treaty. The American Government has never taken advantage of the Clearing House provisions of the Versailles Treaty, and has allowed the option period of these treaty provisions to lapse until now, when it is too late for American claimants to take advantage of them.

Unless American claimants can take advantage of the former rate of exchange, as provided for by Section 4 of Article 10 of the Treaty of Versailles, they will suffer enormous loss; first, because unless this is done it is not clear that mark debts must be paid at former rates of exchange, and second, because of the inability of German debtors to pay and the fact that the reparation provisions of the Treaty will make it impossible for the German Government to pay.

This matter of rate of exchange is of the utmost importance. Take, for instance, the claim of an American bank having a sum of marks on deposit by a German bank at the outbreak of the war. This is a good example of the type of claim involving marks. Thus, if the German bank is permitted to pay these marks at the current rate of exchange, the American bank will be obliged to bear the burden of the tremendous depreciation which has been brought about by the war. That would be eminently unjust.

The provisions of the Treaty of Versailles bearing upon the rate of exchange to be applied in the settlement of former mark debts, are contained in Part 10, Sections 3 and 4, the rights and advantages under Part 10 being reserved to the United States and its nationals under the Porter-Knox Peace Resolution and the Treaty of August 25, 1921.

Section 3 of Part 10 is entitled "Debts", and provides, among other things, for the settlement of debts payable before the war through the intervention of Clearing Offices. By this arrangement debts were to be paid or credited in the currency of the Allied or Associated Power involved, and mark debts, therefore, paid or credited at the rate of exchange of before the war. This rate of exchange is defined as the average cable transfer rate prevailing in the Allied or Associated country involved during the month immediately preceding the outbreak of the war.

It is generally understood that all English and French banks have already been paid in full for their before-the-war deposits in marks with German banks at former rates of exchange, in accordance with the aforementioned section of the Treaty of Versailles. As far as English and French banks are concerned, the rate of exchange, of course, is that which prevailed in 1914, that is, 24 cents a mark. Under the terms of the treaty American claimants are

entitled to only the rate of exchange which prevailed in March, 1917, that is, 17-3/16 cents a mark.

The question of the rate of exchange is only a small part of the problem that America is now called upon to solve in connection with the property held by the Alien Property Custodian. But it is just such questions and considerations which Congress will have to look into before legislating upon this subject.

Congress might well make a study of what England, France, Italy, Belgium and Canada have done in working out a solution of this difficult problem. Each of these countries has done all in its power to avoid the disreputable practice of confiscation. However, none of these countries has disposed of enemy property held by its Public Trustee or Alien Property Custodian without due regard to the rights of its own claimants against the enemy countries and their nationals. Hence, a brief summary of what each of these Allied nations has done in this connection may not be out of place.

Great Britain, with the other Allies, has reserved the right to retain and liquidate all property belonging to German nationals pursuant to Division B of Article 297 of the Treaty of Versailles, which stipulates as follows:

Subject to any contrary stipulations which may be provided for in the Peace Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the Peace Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the Peace Treaty.

Under authority of Division E of Article 297 England proceeded to establish a Clearing House arrangement through which all claims made by England or the other Allies and their nationals passed at the expense of the German property held by the Allied Governments. The important feature of Division E is as follows:

The claims made in this respect by such nationals (nationals of Allied Powers) shall be investigated, and the total of the compensation shall be determined by the mixed arbitral tribunal provided for. . . . This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. . . . The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

From 1919 to 1921 Great Britain, by authority of the sections of the Treaty of Versailles quoted above, issued peace orders to the following effect:

All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force (not being property rights or interests acquired under any general license issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged—

(a) in the first place, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests, including companies and associations in which they are interested in German territory, or debts owing to them by German nationals, and with payment of any compensation awarded by the Mixed Arbitral Tribunal, or by an arbitrator appointed by that Tribunal in pursuance of paragraph (e) of Article 297, and with payment of claims growing out of acts committed by the German Government or by German authorities since the thirty-first day of July, and before the fourth day of August, nineteen hundred and fourteen, but so nevertheless that the claims of British nationals for the proceeds of the liquidation of their property, rights and interests mentioned in Section IV of Part X of the Treaty and in the Annex thereto, and for the enemy debts owing to them referred to in Article 296 of the Treaty, shall rank in priority to any of the other claims above mentioned.

(b) secondly, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests in the territories of Austria-Hungary, Bulgaria and Turkey, and in so far as those claims are not otherwise satisfied.

Provided that any particular property, rights or interests so charged may at any time be released by the Custodian acting under the general direction of the Board of Trade from the charge so created.

In this connection it may be noted that the American Government has been notified through diplomatic channels that Hungary, according to an article which appeared in the Budapest *Pesti Tozsde* of February 2, 1922, will begin the payment of before-the-war debts owed to private individuals in England and France, and that the banks are reported to have collected considerable sums in their safes for this purpose. It is reported, however, that Hungary has been granted a further period of several more weeks' grace for the payment of the first instalment.

Hungary's debt in England is estimated to amount to more than 4,500,000 pounds sterling, and out of that sum 2,000,000 pounds are said to be owed for arrear dividends on Hungary's state loans,

1,000,000 for the debt of the city of Budapest, and at least 1,250,000 by private individuals. The entire debt will be payable in instalments of 250,000 pounds sterling per annum, and the only concession made by England is that this sum may be remitted yearly in two-part payments.

The French Ministry of Foreign Affairs, Office of Private Property and Interests, has issued numerous circulars, each dealing with disposition of alien property in the hands of the French Government. Circular No. 78, issued March 17, 1921, provides for the release of property belonging to Alsace-Lorrainers, who are now Frenchmen by virtue of the Treaty of Versailles. By producing a certificate of their new French nationality, stating the manner in which it was acquired, and by producing documentary evidence of their ownership of property in the hands of the French Government, etc., the French Office of Private Property and Interests will return property thus held to the original owners.

At a meeting held at London by the Directors of the Allied Clearing Offices, the following resolution was passed:

Coupons of allied securities, regardless of their nature, maturing after January 10, 1920, shall only be paid to German nationals where they are unable to prove they acquired those securities from an allied or neutral person subsequent to that date.

France's plan to dispose of enemy property in her hands has been further detailed in numerous other circulars. France and Germany have also entered into a separate agreement providing for the payment of indemnities. In all these circulars and orders the French Government makes ample provision for the protection of private claims held by French nationals against Germany and German nationals. France was one of the first to take advantage of the Clearing House provisions of the Treaty of Versailles.

In the settlement of Hungary's before-the-war debts in France, the French agreement does not fix the payments in the precise terms contained in the English agreement. It only pledges Hungary to pay one-seventh part of her debts in the first year. According to the *Pesti Tozsde* this means that Hungary would have to pay 300,000,000 French francs in 1922. The payments will not be made individually but are to be paid into the Hungary Clearing Office, which will transmit it to the Clearing Houses in Paris.

Italy's governmental policy concerning the disposition of former enemy property held by its Custodian is clearly indicated by an agreement entered into with the German Government. This agreement was contracted on June 10, 1921, and reads as follows:

The representative of the German Government on the one part and the representatives of the Clearing Offices of Belgium, France, Great Britain, Greece, Italy and Siam on the other part, duly authorized by their respective Governments have agreed on the following:

The Allied and German nationals will have until September 30, 1921, inclusive, the right to file in their national offices the claims based on Article 296 of the Treaty of Versailles.

Like England and France, Italy has governed the disposition of enemy property held by its Custodian by the issuance of orders and circulars which expressly provide ample protection for claims in the hands of Italians against Germans and Austrians. Italian operations are conducted in line with the Clearing House policy established by the Versailles Treaty.

Belgium, like the United States, has to date made no definite arrangements concerning the return of enemy property held by that Government. However, the following quotation from the New York *Volks-Zeitung*, of January 25, 1922, entitled *Liquidation of German Property in Belgium*, indicates the nature of the policy which the Belgian Government is adopting in this matter:

The Belgian Government passed a law permitting the sale of German property seized in Belgium. It will involve the sale of property valued between 600 to 900 million francs. The Belgian Government justifies this step by stating that the negotiations with Germany regarding the recall of the six billion marks that were brought into Belgium during the occupation have failed. Belgium demanded that Germany should redeem all that money on the basis of gold exchange, for which Belgium would waive the sale of the seized German property. This action of the Belgian Government put an end to the pending negotiations and it will not only harm the many Germans who were living in Belgium before the war and already were reduced to proletarians, but will also harm the German State. The Belgian Government could do no better favor to those Germans who are endeavoring to stir up hatred against "the enemies", while financially the Belgian State will not be better off than if it had continued the negotiations regarding the redemption of the six billions of German marks.

Further legislation in continuance of this policy is already under advisement.

Claims at present filed by Canadians against all the enemy nationals amount to approximately \$35,000,000, and the enemy property in Canada amounts to perhaps \$38,000,000. The value of the German property is very conservatively estimated. On the other hand, claims for reparations are inordinately exaggerated. These accounts, according to a memorandum transmitted by the State Department to the Attorney General from the American Consul-General at Ottawa, have not been investigated for the purpose of estimating the amount which would probably be awarded by the Reparations Committee, but from a consideration of them \$10,000,000, is stated as probably the maximum amount. In a general way the Government of the Canadian Dominion is following the policy adopted by England.

The Kingdom of the Serbs, Croats and Slovenes, and Czechoslovakia, Poland, Spain and Portugal, as well as the South American Republics, have not been heard from upon this question in a definite form. However, upon inquiry through diplomatic sources, it has been learned that these countries are following broadly the plans adopted by the larger Powers.

In order to do justice to all concerned, the best view of this problem seems to be that of holding all enemy property now in the hands of the Alien Property Custodian as security or a pledge on account of American claims against Germany and Austria and their nationals. This procedure can be harmonized with the policy of the United States Government as expounded since the days of Washington, and expressly provided for by paragraph 5 of the Treaty of Peace with Germany, signed August 25, 1921, pursuant to the Porter-Knox Resolution, which is as follows:

All property of the Imperial German Government, . . . and all German nationals, which was on April 6, 1917, in or has since that date come into the possession of or under the control of, or has been the subject of a demand by the United States of America, . . . be retained by the United States of America and no disposition thereof made . . . until such time as the Imperial German Government . . . shall have made suitable provision for the satisfaction of all claims against said Government, or of persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered . . . loss, damage or injury, to their persons or property, etc.

The Secretary of State having definitely announced that the United States has failed to take advantage of the option period

provided by the Clearing House Sections of the Treaty of Versailles, the accounting between this Government and Germany will have to be between the interested private individuals, and therefore not as between State and State, which is the arrangement now governing the other Allied countries.

The coming into effect of the Peace Treaty of Versailles on January 10, 1920, imposed upon the German Alien Property Custodian the task of making his accounting and winding up his affairs. Within the period of one month, as stipulated by Article 296, Division E, of the Treaty, England with her Dominions, Colonies, and Protectorates, with the exception of the Union of South Africa and Egypt; France with her Colonies; Italy; Belgium, including the Congo State; Siam, Greece and Haiti, declared themselves in favor of the accounting from State to State or the so-called Clearing System. This accounting, as operated by these countries, is done chiefly through the agency of Clearing Offices established by the Peace Treaty, and the work of the German Custodian comes into question wherever he has appropriated or taken under his administration properties concerned in this clearing.

In all fairness to Germany, it should be stated here that the German Alien Property Custodian has done everything within his power to return American and other Allied property seized by him during the war. The report of the German Alien Property Custodian concerning the treatment of American property in Germany under his administration, published for the year 1921 (Reimar Hobbing, Publisher, Berlin), gives an elaborate account and detailed list of the properties taken under the custodian's jurisdiction. Without guaranteeing exactly the figures enumerated in every case, the German Alien Property Custodian gives the following details concerning American property which came under his control during the war:

The total value of property reported to the custodian as belonging to citizens of the United States in Germany amounted, apart from the compulsory administrations, to about 206,152,000 marks, to which are to be added deposits of securities reported by the banks, with a nominal value of about 126,000,000 marks. From the first named amount, there had been transferred to the custodian up to June 1, 1920, about 6,041,800 marks, to which is to be added the interest paid to the custodian under paragraph 7 of the custodial regulations, making a total of roundly 11,000,000 marks, which, so far as it did not represent the proceeds from compulsory administrations, was handed over to the

custodian. About 200,000,000 marks, in addition to the deposits of securities, was simply taken under administration nominally by being booked, that is, left in charge of the debtors. This sum was chiefly made up of cash claims of Americans against German debtors growing out of participation in business, cash deposits in banks, debts for merchandise, acceptances, insurance premiums, etc.

From compulsorily administered or supervised undertakings in Germany belonging to Americans or from American interests in German undertakings there was transferred to the custodian about 67,000,000 marks, to which must be added about 27,000,000 marks in securities. There was paid out by the custodian to enemy owners about 68,000,000 marks from the proceeds of compulsory administrations and supervisions, including stocks. Of the securities deposited with the banks and left in their keeping, although nominally under the administration of the custodian, 460 lots with a total nominal value of 57,519,630 marks had been released up to January 31, 1921. All together, the custodian has thus far released or delivered to American citizens, including these securities owned by Americans, property having a total value of at least 145,000,000 marks.

By holding the enemy property which still remains in the hands of the Alien Property Custodian as collateral security, or a pledge, to secure the payment by Germany and Austria and their nationals of the numerous claims in the hands of American citizens, the United States would not only safeguard the interests of its own nationals but would also thereby insure to these former enemies the ultimate return of their property retained in America. This method would enable America to solve this problem upon principles that are at once just to all concerned and at the same time will result in the gradual disposition of enemy property back to former enemy owners who are now permitted by Section 9 of the Trading With the Enemy Act to present their claims before the proper authorities for allowance.

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